DEVELOPMENT & COMMERCIAL BANK BHD.

v.

ALMAS MOTORS CORP. (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C1752 OF 1984]
4 MARCH 1988

CIVIL PROCEDURE: *Summary judgment - Leave to defend - Guarantor applied to set aside judgment - Triable issues - Plaintiff bank granted banking facilities to defendant company which was secured by a debenture charge to bank - 2nd and 3rd defendants guaranteed payment on demand - 3rd defendant/guarantor filed defence and opposed summary judgment - Whether bank obliged to enforce charge under debenture before proceeding to enforce guarantee - Bank did not crystalise debenture and appoint receivers - Whether bank negligent - Omission of bank to appoint receivers - Whether amounts to being guilty of breach of implied warranty or of a duty owed to guarantors - Security provided by debenture impaired - Whether any triable issues.*

This was the 3rd defendant/guarantor's appeal against the summary judgment by the Senior Assistant Registrar under O. 14 of the Rules of the High Court 1980. The 3rd defendant contended that (i) there was a implied warranty that the bank was obliged to enforce the charge under the debenture before proceeding to enforce the guarantee, (ii) that the bank in not crystallising the debenture and appointing receivers was negligent on its part and also that the omission of the bank to appoint receivers amounts to the bank being guilty of a breach of an implied warranty or of a duty it owed to the guarantors. Consequently the security provided by the debenture had been impaired.

Held:

[1] In the instant case, there certainly was a debenture which was not caused to be crystallised.

[2] However, whether that failure to crystallise the debenture amounted to negligence or a breach of implied warranty or duty and whether or not the 3rd defendant had bargained away his rights preserved by ss. 92 and 94 of the Contracts Act 1950 and in any event whether as a result there had been an impairment of the security all provide triable issues.

[3] The appeal was allowed with costs. The O. 14 judgment as against the 3rd defendant was set aside. The 3rd defendant was given unconditional leave to defend.

[Appeal allowed with costs.]

Cases referred to:

Bank Bumiputra Malaysia Bhd. v. Esah bt. Abdul Ghani [1985] CLJ (Rep) 41
Ng Yik Seng & Anor. v. Perwira Habib Bank [1980] 2 MLJ 83
Duncan, Fox & Co. v. North & South Wales Bank [1880] LR 7 HL 348
Standard Chartered Bank v. Walker [1982] 3 All ER 938
Buckeridge v. Mercantile Credits Ltd. [1981] 56 ALJR 28
Provincial Bank of Canada v. Prince Edward Island Lending Authority 59 DLR (3d) 446

Legislation referred to:
Contracts Act 1950, ss. 92, 94
Rules of the High Court 1980, O. 14

For the 3rd defendant/appellant - M. Nagarajah; M/s. Shook Lin & Bok.
For the plaintiffs/respondents - N. Chandran; M/s. Adnan Sundra & Low.

JUDGMENT

VC George J:

This is the 3rd defendant's appeal against the Senior Assistant Registrar granting O. 14 judgment against him.

The plaintiff bank had granted certain banking facilities to the 1st defendant company which facilities were secured by a debenture dated 11 April 1983 by which all the assets of the 1st defendant including all moveable and immoveable property and undertakings of the company "both present and future" were charged to the bank.

The 2nd and 3rd defendants guaranteed the payment on demand of the monies owing by the 1st defendant.

Due demand was made for payment and on the failure to receive any payments the instant writ was caused to be issued. The 1st and 2nd defendants allowed judgment to be entered against them. The 3rd defendant resisted the claim. He filed a defence and opposed the O. 14 application.

Two aspects of the suggested defence merit consideration. First there is the contention that there was an implied warranty that the bank was obliged to enforce the charge under the debenture before proceeding to enforce the guarantee. The second contention is that the bank not crystalising the debenture and appointing receivers was negligent on its part and also that the omission of the bank to appoint receivers amounts to the bank being guilty of a breach of an implied warranty or of a duty it owed to the guarantors. It was contended, that as a result, the security provided by the debenture had been impaired. Section 92 and 94 of the Contracts Act were invoked:

> 92. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.
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> 93 ...
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> 94. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the security is discharged to the extent of the value of the security.

Bank Bumiputra Malaysia Bhd. v. Esah bt. Abdul Ghani [1985] CLJ (Rep) 41 is authority for the proposition that the guarantor has no special right to demand that the bank should call upon the principal debtor to pay off the debt. In that case *Ng Yik Seng & Anor. v. Perwira Habib Bank* [1980] 2 MLJ 83 was not followed and *Duncan, Fox & Co. v. North & South Wales Bank* [1880] LR 7 HL 348 was referred to with approval in support of the proposition that a guarantor cannot decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor.

However, that does not dispose of the invocation of those two sections of the Contracts Act in respect of which *Pollock & Mulla* (10th Edn. at p. 753) says in respect of the Indian ss. 139 and 141 which are equipollent to our ss. 92 and 94, that:

> Where due to negligence of the creditor the security given by the principal debtor is lost and the right of the surety against, the principal debtor is impaired due to any action or inaction of the creditor, the surety is discharged to that extent under the combined effect of ss. 139 and 141 of the Act.

For the bank Clause 17 of the document of guarantee is relied upon.

> 17. The bank shall be under no liability to marshall in our favour any securities or any of the funds or assets which the bank may be entitled to receive or upon which the bank has a claim.

The question that arises is whether Clause 17 does away with the ss. 92 and 94 of the Act and in any event does it or any other provision in the document of guarantee have the effect of exempting the plaintiffs from the alleged negligence and alleged acts of breach of warranty and duty and if not, was there in fact negligence or the said breaches that has resulted in impairment of the security.

In *Standard Chartered Bank v. Walker* [1982] 3 All ER 938 it was held that the duty of care owed by the receiver of company under a debenture in disposing of the company's assets was owed not only to the company but also to a guarantor of the company's liability under the debenture.

In *Buckeridge v. Mercantile Credits Ltd.* [1981] 56 ALJR 28 it was stated that:

> In a case where the act of a creditor does not discharge a surety, but the creditor has nonetheless sacrificed or impaired a security, or by his neglect or, default allowed it to be lost or diminished, the surety is entitled in equity to be credited with the deficiency in reduction of his liability.

However, in that case the judgment did go on to state that the sureties' entitlement is lost if he bargains away his right to complain.

In *Provincial Bank of Canada v. Prince Edward Island Lending Authority* 59 DLR (3d) 446 it was held that:

> A creditor owes a duty to the guarantor of a debt to exercise due diligence in preserving and enforcing securities applicable to the debt guaranteed. Consequently, where a creditor, holding chattel mortgage and a charge under s. 88 of the Bank Act, RSC 1970, c.B-1 as security of a debt fails to exercise ordinary prudence to realise the securities and permits the debtor's assets to be dissipated, a guarantor of the debt is discharged from his obligation.

In the instant case there certainly was a debenture which was not caused to be crystallised. Whether that amounted to negligence or a breach of implied warranty or duty and whether or not the 3rd defendant had bargained away his rights preserved by ss. 92 and 94 and in any event whether as a result there had been an impairment of the security all provide triable issues.

Accordingly the appeal is allowed with costs. The O. 14 judgment as against the 3rd defendant is set aside. The 3rd defendant is given unconditional leave to defend.

Also found at [1989] 1 CLJ 915